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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Closed Captioning and Video)
Description of Video Programming)
)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Program Accessibility)
_____)

MM Docket No. 95-176

COMMENTS

INDIANA HIGHER EDUCATION
TELECOMMUNICATION SYSTEM

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COMMENTS

Pursuant to Section 1.415 of the Commission's Rules, the Indiana Higher Education Telecommunication System ("IHETS") hereby submits its comments on the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.¹

I. **SUMMARY**

IHETS fully supports Congress's goal in adopting Section 713 of the Telecommunications Act of 1996 "to ensure that all Americans ultimately have access to video services and programs." Based on the Commission's proposed rules for captioning, it appears that ITFS stations would not be obligated to caption instructional video programming. IHETS supports this result.

IHETS also urges the Commission to consider the impact that its proposed captioning requirements may have on ITFS programmers operating on a small

¹ Closed Captioning and Video Description of Video Programming, FCC 97-4 (released Jan. 17, 1997).

production budget if broadcast stations or cable systems which distribute instructional programming attempt to shift captioning requirements to ITFS programmers. To avoid such a result, the Commission should exempt ITFS service or, alternatively, the class of ITFS programming, from any captioning requirements. This is again the correct result because most ITFS entities are likely to have existing obligations under the Americans with Disabilities Act and/or Section 504 of the Rehabilitation Act of 1973 to provide accessibility to instructional materials for enrolled students who are deaf or hearing-impaired. Moreover, because ITFS systems are closed systems, ITFS licensees can identify deaf and hearing-impaired students enrolled in their classes and provide any necessary assistance. Thus, the expense of captioning is greatly outweighed by any incremental benefits.

Finally, IHETS recommends that no captioning requirements be imposed on video libraries maintained by ITFS licensees. Any such requirement would be excessive, unnecessary and prohibitively expensive.

II. IHETS IS COMMITTED TO PROVIDING ACCESS TO INSTRUCTIONAL PROGRAMMING FOR DEAF AND HEARING-IMPAIRED STUDENTS.

IHETS is, or is affiliated with, an accredited educational institution which offers formal, for-credit instruction leading to the award of diplomas and/or degrees to enrolled students. IHETS is also the licensee of one or more Instructional Television Fixed Service ("ITFS") stations and is authorized by the

Commission to transmit ITFS programming to receive sites associated with its educational mission. In accordance with the Commission's Rules, IHETS uses its ITFS facilities to transmit "formal educational programming offered for credit to enrolled students."²

In this proceeding, the Commission is proposing to implement the requirements of Section 713 of the Telecommunications Act of 1996,³ and adopt regulations to ensure that "video programming first published or exhibited after the effective date of such regulations is fully accessible through the provision of closed captions."⁴ IHETS already has in place procedures to make its ITFS programming accessible to deaf and hearing-impaired students. Moreover, without regard to the regulations adopted in this proceeding, IHETS intends to continue using appropriate procedures, including closed captioning, to ensure that deaf and hearing-impaired students can participate in "distance learning" at their respective institutions.

IHETS fully supports Congress's goal in adopting Section 713 "to ensure that all Americans ultimately have access to video services and programs."⁵ As educators and ITFS licensees, IHETS is well aware that video programming is becoming an integral aspect of classroom instruction, and that it is critical for all

² 47 C.F.R. § 74.931(a)(1).

³ Pub. L. 104-104, § 305, 110 Stat. 56, 126-28 (1996) (codified at 47 U.S.C. § 613).

⁴ 47 U.S.C. § 613(b)(1).

⁵ H.R. Rep. 104-458, 104th Cong., 2d Sess., at 183 ("Conf. Report").

students to have access to such programming when and if it is incorporated into an educational curriculum. The comments submitted herein on the Commission's proposals in the NPRM are thus based on the experience of IHETS in providing accessibility to video programming and their obligations as educators to all students, including deaf and hearing-impaired students. In order for the Commission to understand the breadth of experience and educational perspectives on which these comments are based, a brief description of IHETS is provided below.

IHETS is a consortium of public and private institutions of higher education in Indiana, which provides various telecommunications network services shared by the member institutions. The IHETS television network generally transmits four channels of credit courses, noncredit courses, and continuing education programs from any of five major college campuses to more than two hundred user sites throughout the state. The IHETS network consists of 29 ITFS stations, which are used to extend television network service to each of Indiana's ninety-two counties.⁶ In recent years, IHETS has also incorporated satellite transmissions into its network to deliver programming directly to the headend for individual stations in the ITFS network.

⁶ Twenty-five of these ITFS stations are licensed to the Trustees of Indiana University and four are licensed to the Trustees of the Vincennes University on behalf of the IHETS consortium.

III. THE COMMISSION SHOULD EXCLUDE ITFS LICENSEES FROM THE DEFINITION OF "VIDEO PROGRAMMING PROVIDERS."

The Commission proposes to impose the responsibility for compliance with captioning requirements on "video programming providers," which it defines (NPRM, ¶ 28) as "all entities who provide video programming directly to a customer's home, regardless of the distribution technologies employed by such entities." This definition is consistent with the definition in the legislative history of the Act of "provider" as "the specific television station, cable operator, cable network or other service that provides programming to the public."⁷ According to the Commission (NPRM, ¶ 5), video programming providers would include broadcast television stations, cable television, direct-to-home satellite dishes, wireless cable systems, satellite master antenna television, and open video systems.

It appears from the Commission's definition of "video programming provider" that ITFS stations are not included among the parties that would be responsible for the captioning requirements. This is the correct result because ITFS stations generally do not deliver video programming directly to the public or consumers' homes. Rather, ITFS programming is distributed through a closed-circuit system to receive sites established by the licensee, and is primarily intended to be viewed only by students who have paid any relevant tuition and registered for the specific course in which the programming is used as

⁷ H.R. Rep. 104-204, 104th Cong., 2d Sess., at 114 (1995).

instructional material. IHETS recommends that, when it promulgates regulations for the captioning requirements, the Commission should make clear the exclusion of ITFS stations from the definition of "video programming provider."

IV. ITFS PROGRAMMING SHOULD BE EXEMPT FROM THE CAPTIONING REQUIREMENTS.

IHETS shares Congress's goal of making video programming accessible to all individuals. Indeed, IHETS already ensures that deaf and hearing-impaired students at their respective institutions have the same opportunities to benefit from instructional video programming as any other student. Although the Commission apparently does not intend to impose the captioning requirements on ITFS stations, there are circumstances in which ITFS programming is delivered to consumers over cable systems. The Commission anticipates that "our rules will result in video programming providers incorporating [captioning] requirements into their contracts with video producers and owners, regardless of which party has the obligation to comply with our rules." (NPRM, ¶ 30). Thus, it is possible that a video programming provider may seek to shift the burden of captioning to an ITFS licensee as a condition of carrying its instructional programming.

The Commission has sought comment on whether instructional programming should be exempted from the captioning requirements. (NPRM, ¶ 76). If the responsibility for captioning were shifted to an ITFS station, it is likely that the cost of captioning would be economically burdensome for an ITFS licensee. And, since even without a captioning requirement, IHETS makes ITFS

programming accessible to deaf and hearing-impaired students, as well as other disabled students, for instructional purposes, the goal of accessibility is already being attained with respect to the primary purpose of the video programming. Accordingly, IHETS recommends that the Commission exempt from the captioning requirements all ITFS programming that may be retransmitted over a broadcast station or cable system using any technology.

A. ITFS Entities Are Generally Required to Ensure the Accessibility of Instructional Programming.

There would be a lack of incremental benefit in having a captioning obligation for ITFS programming because most ITFS licensees are already subject to the Americans with Disabilities Act ("ADA")⁸ and/or Section 504 of the Rehabilitation Act of 1973.⁹ The ADA and Section 504 require institutions subject to these Acts to provide reasonable accommodation for deaf and hearing-impaired students to access instructional material, which includes ITFS programming.¹⁰ To allow an additional captioning requirement to be shifted to

⁸ 42 U.S.C. §§ 12101 *et seq.* The ADA generally prohibits action which would cause a person with a disability to be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity.

⁹ 29 U.S.C. § 794. Section 504 generally ensures that individuals with disabilities are not excluded from participation in or denied the benefits of a program or entity receiving federal financial assistance.

¹⁰ See 47 C.F.R. § 74.932(a) ("With certain limited exceptions . . . a license for an instructional television fixed station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such

these ITFS entities would impose a new economic burden in order to accomplish what is already being supplied to students under the ADA and/or Section 504.

Although IHETS itself is not subject to the Rehabilitation Act of 1973 or the ADA, it voluntarily complies with the requirements of these statutes. For hearing-impaired students who may be enrolled in ITFS-delivered courses, IHETS has acquired 12 sets of portable, stenocaptioning equipment. This equipment can be moved to any ITFS station in the system to produce captioned transmissions on request. To date, no such requests have been received.

The legislative history of the Telecommunications Act of 1996 points out that among the factors to be considered by the Commission in determining appropriate exemptions is "the existence of alternative means of providing access to the hearing impaired."¹¹ IHETS already devotes considerable resources to meeting the requirements of Section 504 and/or the ADA and ensuring that its ITFS programming, like all instructional materials, is accessible to all students. Section 713 of the Act addresses the same concerns but provides less flexibility to educators in meeting the needs of deaf and hearing-impaired students.

Furthermore, to allow a captioning obligation to be imposed on ITFS programming could disrupt accessibility programs already in place at educational institutions. If ITFS licensees were required to allocate funds for production of captioning services, it is likely that such an allocation would divert resources from

accredited institutions and governmental organizations").

¹¹ H.R. Rep. 104-204, 104th Cong., 2d Sess., at 115 (1995).

activities designed to develop multiple methods of making instructional material accessible to deaf and hearing-impaired students. Having available multiple methods of accessibility is necessary so that a solution can be tailored to fit various educational and individual circumstances.

B. ITFS Systems Can Ensure Accessibility to
All Deaf and Hearing-Impaired Students.

Aside from existing obligations, the goals of any captioning requirement would generally be met for the educational use of ITFS programming. The stated goal of Section 713 of the Act is to make video programming accessible to the deaf and hearing-impaired. However, the Commission's proposal to impose the requirement on commercial programming providers indicates that the primary targets of this legislation are broadcast and cable programming providers which make available a uniform schedule of video programming, financed by advertising or monthly subscriber fees, to all consumers in their markets. In contrast, ITFS programming is not generally available to the public. Rather, the primary purpose of ITFS programming is distribution through a closed system to students who have paid any relevant tuition and registered for the specific course in which the programming is used as instructional material.

The distinctions between commercial and ITFS video programming are significant for any captioning obligation. For its primary purpose, ITFS programming is transmitted by educational institutions, and the licensee can easily determine whether there is a need to accommodate deaf or hearing-

impaired students at the receive site and how best to accommodate those needs. If the burden of captioning were shifted to ITFS programmers, the result would be captioning where there may be no specific need, and would constitute an extravagant allocation of educational institutions' scarce resources without the intended educational benefit.¹² Unless instructional programming is exempt from the captioning requirement, it may no longer be available for distribution on cable systems to the detriment of viewers and ITFS programmers.

C. The Necessary Expenditures to Caption ITFS Programming Militate Against a Captioning Requirement.

Captioning ITFS programming would impose substantial economic and administrative burdens on ITFS licensees. These costs may raise the cost per program hour for captioning ITFS programming above that for commercial video systems, and may restrict the ability of ITFS licensees to offer "distance learning."

First, as the Commission recognizes (NPRM, ¶¶ 18-22), captioning is an expensive procedure, and as it also recognizes (NPRM ¶ 76), a local programmer, such as an ITFS station, "typically operates on a relatively small production budget." But, to these basic costs of captioning, ITFS programmers would be required to add costs for real-time captioning because many instructional programs are transmitted live from a studio classroom, at times with spontaneous

¹² Many ITFS programs are taped for replay. For tapes available for replay to enrolled students as part of a course curriculum, as for the live version, IHETS would provide accessibility for deaf and hearing-impaired students.

audio feedback from remote sites. This procedure not only raises the cost of captioning but also requires skilled stenocaptioners, whose services are more expensive.

Second, accurate captioning of classroom lectures would require a stenocaptioner with an expertise in particular fields of study. If the person responsible for captioning the lecture, whether live or taped, is not well versed in the subject being taught, then there is a risk that the captions will not accurately reflect the material. And, as the Commission notes, a stenocaptioner with such special expertise will be more difficult to locate and more expensive to employ,¹³ and additional lead time may be required for the captioner to learn the material.

Third, effective classroom instruction often requires the use of visual aids, including computer screens, on which the camera is trained during programming,¹⁴ while the lecturer continues to talk. It is not clear how an ITFS programmer would caption its programs without damaging the clarity of such visual displays. If a student cannot see the graphic on the screen or decipher the instructor's notes on the blackboard because they are obscured by captions, then the captions would be doing more harm than good. Moreover, the lecturer may

¹³ Regarding live captioning, the Commission notes that "[i]t is unclear that the number of stenocaptioners with advanced training to provide such captions at the highest quality levels is sufficient at this time to meet the expanded demand for stenocaptioning services that our proposed rules will engender." NPRM, ¶ 113. This obstacle is magnified in the case of ITFS programming for which captioners must also be familiar with the subject matter.

¹⁴ See NPRM, ¶ 73 (proposing to exempt "video programming that is primarily textual").

bring in materials which will not allow readjustment of the camera to leave a place for captions.

More importantly, live instructional broadcasts are based primarily on textual and graphical information which changes significantly from frame-to-frame. In addition to the problems outlined above, captioning of this programming would force the student to concentrate on two fields of text: the captions of the lecture and the textual or graphical materials.

V. THE COMMISSION SHOULD ADOPT AN EXEMPTION FOR ALL VIDEO PROGRAMMING TRANSMITTED AS INSTRUCTIONAL MATERIAL.

Section 713 permits the Commission to exempt ITFS providers and/or programming from captioning regulations by adoption of an exemption for the class of ITFS programming.¹⁵ IHETS strongly recommends that the Commission adopt an exemption for ITFS programming that is used for curriculum-based educational purposes.¹⁶ As discussed above, "the economic burden of captioning [ITFS programming] outweighs the benefits to be derived from captioning and, in some cases, the complexity of adding the captions." (NPRM, ¶ 70.) The fact that some ITFS stations are used for commercial distribution of programming as part of a "wireless cable" system does not change this evaluation.

¹⁵ 47 U.S.C. § 613(d)(1).

¹⁶ It would be appropriate to exempt all programming which falls within the permitted uses of ITFS stations. See 47 C.F.R. § 74.931(a-d).

For example, IHETS recommends a regulation which provides:

Video programming which is utilized primarily as instructional material as defined in Section 74.931(a-d) of the Commission's Rules and is transmitted by or on behalf of an ITFS licensee to its registered receive sites on either frequencies licensed to the video programming provider or frequencies licensed or leased to a wireless cable operator with whom the ITFS licensee has entered into an excess capacity lease agreement is exempt from any captioning requirement. When programming transmitted on ITFS frequencies is customarily offered as part of the regularly-scheduled commercial programming of a wireless cable operator, then the regulations applicable to wireless cable systems shall apply; provided that, incidental transmission of instructional programming to subscribers of a wireless cable system shall not be deemed regularly-scheduled commercial programming.

IHETS believes that such an exemption strikes the appropriate accommodation for instructional programming, yet ensures that the exemption would not be used to avoid a captioning requirement for other programming.

VI. NO CAPTIONING REQUIREMENT SHOULD BE IMPOSED
ON VIDEO LIBRARIES MAINTAINED BY ITFS LICENSEES.

The Commission has requested comment (NPRM, ¶¶ 51-62) on how to implement Congress's direction in Section 713 that "video programming providers or owners maximize the accessibility of video programming first published or exhibited prior to the effective date" of the regulations adopted in this proceeding.¹⁷ As the Commission recognizes, there is an "enormous amount" of uncaptioned, video programming (NPRM, ¶ 57), and a mandatory captioning requirement "could place a significant burden on the owners and providers" of

¹⁷ 47 U.S.C. § 613(b)(2).

such programs (NPRM, ¶ 58). IHETS is the owner of a substantial video library, and agrees with the Commission's conclusion (NPRM, ¶ 58) that it would be inappropriate to mandate captioning of all such programming.

Although it has recognized the significant burden on owners of such programming, the Commission is proposing to establish a percentage requirement for captioning of previously-published video programming and deadlines for a transition schedule. (NPRM, ¶ 58). IHETS submits that, for the reasons outlined below, any such requirements as applied to ITFS licensees would be unworkable and unnecessary and so should not be adopted.

First, by imposing requirements on video libraries held by educational institutions, the Commission would be interceding in the educational policies of such institutions, and there is simply no need for it to do so. The goal of Section 713 with respect to older video programming is to "maximize accessibility" to the material. As discussed above, most ITFS licensees are under independent obligations to make instructional materials accessible to deaf and hearing-impaired students. The cost of captioning or acquiring new versions of older programming would be economically burdensome for educational institutions and may divert resources from their ongoing efforts to provide accessibility to deaf and hearing-impaired students. Given the fact that educational institutions would generally "maximize accessibility" without Commission-imposed requirements, it is not necessary for regulations adopted for library programming to be applied to them.

Second, video libraries held by educational institutions are, by necessity, always being updated to stay current. Over time, previously published programming will be archived in favor of newer, captioned programs. Ultimately, the goal of maximizing accessibility of educational programming will be reached without imposing a percentage requirement or deadlines. In any event, it is illogical for the Commission to impose a mandatory captioning requirement on programming that may be obsolete in a few years.

Third, the Commission should not impose a captioning requirement on library programming of ITFS licensees because of the cost, which the Commission has itself recognized as a significant burden. Even without such a requirement, the market will encourage educational institutions to replace frequently-transmitted programming with captioned versions when available. The Commission simply does not need to intercede in the educational policies of ITFS licensees nor their internal guidelines for providing accessibility to deaf and hearing-impaired students.

Fourth, it is not at all clear from the discussion in the NPRM what the Commission defines as "library programming" for the purpose of imposing any requirements for captioning. The Commission notes (NPRM, ¶ 5) that Section 713 applies to "all types of video programming delivered electronically to consumers." However, its discussion of "library programming" appears to encompass any video programming first published or exhibited prior to the effective date of the closed captioning regulations (NPRM, ¶ 51).

The "video library" of an ITFS entity may include thousands of titles, not all of which are delivered electronically to enrolled students over the ITFS system. For example, instructors commonly request addition of educational programming or of internally-produced recordings of class lectures to video library collections so that they can be used in class independently of the ITFS facility, or so that students can view them individually. IHETS submits that it would be inappropriate for the Commission to impose any blanket requirement on owners of video programming to caption programming that is not broadcast over a video programming provider's facilities.¹⁸

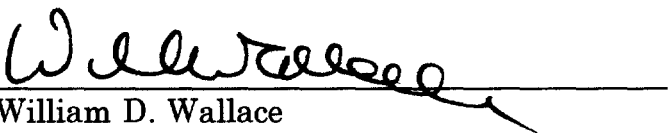
¹⁸ It is not clear how the Commission would impose captioning requirements on educational institutions that are not licensed to provide radio transmissions. It would be inequitable for IHETS to be required to caption a percentage of video programming in their libraries while non-licensee institutions are not so required.

VII. CONCLUSION

Accordingly, for the reasons set forth above, IHETS urges the Commission to adopt rules governing the captioning of video programming consistent with the views expressed herein.

Respectfully submitted,

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